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CALIFORNIA COMMON CAUSE

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

FAIR POLITICAL PRACTICES COMMISSION, a state agency, Plaintiff, v. AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally recognized Indian tribe; and DOES I-XX, Defendant.	Case No.: 02AS04545 UNLIMITED JURISDICTION **MEMORANDUM OF POINTS AND AUTHORITIES BY *AMICUS CURIAE* COMMON CAUSE IN OPPOSITION TO DEFENDANT'S MOTION TO QUASH SERVICE FOR LACK OF PERSONAL JURISDICTION** Judge: Hon. Loren E. McMaster Date: December 20, 2002 Time: 2:00 p.m. Department: 53 Trial Date: none set

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I. INTRODUCTION

The Agua Caliente Band of Cahuilla Indians ("Agua Caliente") is an aggregation of roughly 300 California citizens that has contributed over $5 million (and perhaps twice that much) to California state political campaigns since 1997 and spent nearly $400,000 on lobbying activities during 2001 and 2002 alone. Agua Caliente's remarkable generosity has placed it consistently among the top ten contributors to California political campaigns over the past five years. In the 1997-98 election cycle, for example, Agua Caliente was the third largest contributor to state legislative campaigns. In the following election cycle (1999-2000), it was ninth. Collectively, Agua Caliente and California's other Indian tribes have become far and away the largest source of contributions to state legislative campaigns over the past five years.

Agua Caliente's decision to engage in such massive political contributions and lobbying activities subject it to the reporting requirements of California's Political Reform Act ("PRA"). Cal. Gov't Code §§ 81000, *et seq*. Specifically, the PRA requires Agua Caliente (and all other similarly situated large political contributors and lobbyist employers) to file regular reports with the Secretary of State, disclosing, *inter alia*, each of its contributions of $100 or more to any candidate and ballot measure campaign, the total amount of its contributions, the amount it has spent on lobbying activity, and the specific matters on which it has lobbied the state government. Agua Caliente cannot meaningfully contest the proposition that it is subject to the PRA's disclosure requirements, just like any other major donor to California political campaigns or entity lobbying the state government.

Nevertheless, Agua Caliente boldly asserts that, even if it is required to disclose its multi-million dollar political contributions and the payments for its continuous lobbying activities, the FPPC cannot enforce those requirements in state court because the common law doctrine of Indian tribal sovereign immunity prohibits such a suit. In other words, Agua Caliente contends that, because it is a federally-recognized Indian tribe, it is above the law and therefore free to ignore with impunity the PRA's reporting requirements, to which all others are subject. This extraordinary argument is not the law and Agua Caliente cannot cite any case that justifies giving Indian tribes a free pass from the reporting requirements to which all other contributors and lobbyists are subject.

The law is that tribal sovereign immunity is a limited common law doctrine. Although it has been applied in cases that involve disputes over tribal lands, tribal self-governance, and tribal commercial activities, economic development and self-sufficiency, this case implicates none of those interests. To the contrary, this case involves the state's efforts to require Agua Caliente to report truthfully about its efforts to influence state government with multi-million dollar campaign contributions and sustained lobbying activity.

As discussed more fully below, in this context, the state's compelling interests in enforcing the PRA's reporting requirements (*i.e.*, eliminating corruption from the political process and keeping the electorate fully and timely informed about the influences on state politics and government), which have repeatedly been held sufficient to sustain the PRA's reporting requirements even over First Amendment challenges, establish a limit on the scope of tribal sovereign immunity. Especially because of the extent of Agua Caliente's efforts to influence state politics and government, the state's interests in requiring Agua Caliente to comply with the PRA's reporting requirements are particularly acute. Accordingly, because this Court's exercise of jurisdiction over this suit implicates none of Agua Caliente's sovereign interests and will not interfere with any federal interest in the regulation of Indian affairs, the Court should deny Agua Caliente's motion to quash and hold that it is subject to suit for its clear violations of the PRA's reporting requirements, just as any other major political donor or state governmental lobbyist would be. Any other result would not only exempt Agua Caliente (and other Indian tribes) from the rules to which all other lobbyists and contributors are bound, but would unfairly advantage one point of view in the political marketplace, by giving Indian tribes a blank check to flout state law at their pleasure.

II. ARGUMENT

Agua Caliente does not dispute that the PRA's reporting requirements properly apply to regulate its active involvement in the state's political processes. Opening Brief at 2 (arguing that the merits of the FPPC's claims are irrelevant). Nor could it. The law is well settled that a tribe's off-reservation activities generally fall within the a state's regulatory reach. *See Mescalero Apache*

Tribe v. Jones, 411 U.S. 145, 148-49 (1973). Specifically, as the only court to have squarely addressed the issue in a published opinion has held, "activities initiated within the reservation and reasonably calculated to influence voters outside the reservation are a proper concern of the state and subject to its reasonable regulation." *State of Minnesota v. Red Lake DFL Comm.*, 303 N.W.2d 54, 56 (Minn. 1981) (affirming order of civil contempt for violation of an injunction enforcing compliance with state's campaign disclosure requirements).

Notwithstanding these precedents, Agua Caliente argues that the FPPC cannot sue it to enforce the PRA's reporting provisions consistent with the doctrine of tribal sovereign immunity. According to Agua Caliente, the only fact this Court need consider is its status as a tribe -- for that sole reason Agua Caliente claims it is immune from this enforcement proceeding, notwithstanding its clear violations of the PRA. Agua Caliente is wrong.

A. Tribal Sovereign Immunity Is A Limited Common Law Doctrine That Has Never Been Applied To Bar A Claim Arising From Tribal Involvement In The State Political Process.

Tribal immunity from suit is a common law doctrine, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985) ("Indian tribes generally enjoy a common law immunity from suit."), that "developed almost by accident" from judicial interpretation of Supreme Court opinions dating from the early twentieth century, *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 757 (1998). As a common law doctrine, "generalizations" about tribal sovereign immunity from suit, like the related doctrine of tribal immunity from regulation, are "particularly treacherous." *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). As the Supreme Court has held, there is no "inflexible *per se* rule precluding state jurisdiction over tribes and tribal members." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987); *see United States v. State of Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1982) ("The immunity . . . is not absolute.").[1] To the contrary, the doctrine of

[1] To argue otherwise, the Tribe quotes language in *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 559 (9th Cir. 2002). The United States Supreme Court subsequently granted *certiorari* in *Bishop Paiute Tribe. Inyo County v. Paiute-Shoshone Indians of Bishop Community of Bishop Colony*, 2002 WL 1969308, 71 USLW 3163 (U.S. Dec 02, 2002).

tribal sovereign immunity from suit is "of limited character," *United States v. Wheeler,* 435 U.S. 313, 323 (1978), and any analysis of its application to a given case is necessarily context-specific.

In recent cases, the Supreme Court has questioned the wisdom of perpetuating the doctrine of tribal sovereign immunity, particularly when applied to "modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities." *Kiowa*, 523 U.S. at 757-58; *see Oklahoma Tax Comm'n v. Citizen Band Potowatomi Indian Tribe of Okla.*, 498 U.S. 505, 514-15 (1991) (Stevens, J., dissenting) (criticizing tribal sovereign immunity as "anachronistic"). While the courts have retained this judge-made doctrine, it has been applied only in contexts where the lawsuits in question affected tribal lands, tribal self-governance or commercial transactions that foster tribal economic development and self-sufficiency. *See Kiowa*, 523 U.S. at 754-58. Specifically, courts have applied the tribal sovereign immunity doctrine to preclude suits against tribes arising from: (a) a tribe's failure to collect state taxes applying to on-reservation commercial transactions with non-tribal members, *e.g.*, *Potawatomi*, 498 U.S. 505; (b) state regulation over the use of reservation natural resources, *e.g.*, *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 175-76 (1977); (c) a tribe's commercial activities with private citizens, *e.g.*, *Kiowa*, 523 U.S. at 760; and (d) intra-tribal controversies affecting tribal self-government, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 53.

None of these cases, however, has gone so far as to grant a tribe immunity from suit arising from its failure to timely and accurately disclose its voluntary participation in a state's political process. Indeed, prior to *Kiowa*, the Court had "never considered whether a tribe is immune from a suit that has no meaningful nexus to the tribe's land or its sovereign functions." 523 U.S. at 764 (Stevens, J., dissenting). Although the *Kiowa* Court extended tribal immunity to suits arising from off-reservation commercial activities, *id.* at 758, no case has yet extended tribal sovereign immunity so far as to preclude an action to enforce state campaign contribution and lobbyist activity reporting requirements against a tribe, like Agua Caliente, that has become one of the largest contributors to state political campaigns and a significant lobbyist. The compelling nature of the State's interests in

preserving the integrity of its political processes from undisclosed financial interests and informing its electorate justifies a minimal limitation on tribal sovereign immunity in this context.

B. The People's Compelling Interests In Preserving The Integrity Of The State's Political Processes And Informing The Electorate About Financial Influences On State Politics Limit The Scope Of Common Law Tribal Sovereign Immunity.

The purposes of the PRA and its reporting requirements are stated in the Act itself. In enacting the PRA, the People of the State of California found that "[s]tate and local government should serve the needs and respond to the wishes of all citizens equally, without regard to their wealth," Cal. Gov't Code § 81001(a). The People expressed concern that the "influence of large campaign contributors" over election campaigns and governmental decisions was both "disproportionate" and "increased because existing disclosure laws ha[d] proved inadequate," *id.* § 81001(c) & (d), and "suffered from inadequate enforcement . . . ," *id.* § 81001(h). In light of these concerns, the People enacted the PRA with the express purposes of assuring that "receipts and expenditures in election campaigns . . . be fully and truthfully disclosed *in order that the voters may be fully informed and improper practices may be inhibited*," *id.* § 81002(a) (emphasis added), and that the Act will be "vigorously enforced," *id.* § 81002(f). If any uncertainty remained with respect to the intended scope of the Act, the People expressly mandated that the PRA "should be liberally construed to accomplish its purposes." *Id.* § 81003.

One manner in which the PRA attempts to fulfill the twin goals of informing the electorate and inhibiting improper influences on the political process is by imposing regular reporting requirements on those who involve themselves in state politics and government by making significant campaign contributions and/or hiring lobbyists. Major political donors (*i.e.*, those who give more than $10,000 per year to candidate and/or ballot measure campaigns) are required to file semi-annual reports of their campaign contributions with the FPPC, *id.* §§ 82013(c), 84200(b) & 84211(i)-(k). They are also separately required to report "late contributions," *i.e.*, those made after the close of a semi-annual reporting period, but prior to the relevant election. *See id.* §§ 82036, 84200.7 & § 84200.8. Lobbyist employers must file quarterly reports disclosing their lobbying expenditures and activities. *Id.* §§ 82039.5 & § 86116.

The PRA's major donor reporting requirement applies to any "person" who makes campaign contributions totaling $10,000 or more in a calendar year. *Id.* §§ 82013(c) & 84200(b). The lobbyist employer reporting requirements apply to any "person" who employs lobbyists or contracts for the services of a lobbying firm to influence legislative or administrative action. *Id.* § 82039.5. Agua Caliente gives well over $10,000 per year in political campaign contributions, regularly retains lobbyists to influence governmental action, and is clearly a "person" within the meaning and reach of the PRA, *see id.* § 82047 (defining "person" to include "any . . . organization"); *Fair Political Practices Comm'n v. Suitt*, (1979) 90 Cal. App. 3d 125, 133 (governmental entities are "persons" within the meaning of Section 82047). Accordingly, there can be no doubt that Agua Caliente is subject to these reporting requirements. Importantly, the PRA provides no exception from its requirements for Indian tribes. Quite the contrary, consistent with the policies of liberal construction and vigorous enforcement, the PRA expressly prohibits the exemption of any "person" from any of its requirements -- including the reporting requirements. *See id.* § 84400.

Faced with the inevitable conclusion that it is covered by the PRA's major donor and lobbyist employer reporting requirements, Agua Caliente seeks the shelter of tribal sovereign immunity to protect itself from the consequences of its blatant failure to satisfy its obligations under the PRA. In other words, Agua Caliente argues that, unlike other state campaign contributors and lobbyists, it cannot be held accountable for violations of its statutory reporting obligations because it is immune from suit in state court. This argument stretches the bounds of tribal sovereign immunity too far.

As noted above, the common law doctrine of tribal sovereign immunity is "of limited character," *Wheeler,* 435 U.S. at 323. The courts have not yet had the opportunity to explore all of the limits on the doctrine, but that does not render them inscrutable, let alone non-existent. In this case, the enormity of the People's interests in preserving the integrity of the state's political processes and keeping the electorate fully and timely informed about the financial influences on state politics, and the centrality of those interests to the state's ability to maintain the representative character of its democratic institutions, dictate that tribal sovereign immunity cannot extend to bar

the FPPC's efforts to enforce of the PRA's reporting provisions against one of the largest contributors to state political campaigns. In other words, the compelling state interests underlying reporting provisions of the PRA establish a limit on the reach of tribal sovereign immunity.

"The manifest purpose[s] of the financial disclosure provisions of the [PRA] is to insure a better informed electorate and to prevent corruption of the political process," *Thirteen Comm. v. Weinreb,* 168 Cal. App. 3d 528, 532 (1985). The fundamental significance of these state interests is most clearly illuminated in cases in which reviewing courts have found them sufficient to justify the PRA's financial disclosure requirements, *id.* at 534; *see FPPC v. Superior Court,* 25 Cal. 3d 3, 46-47 (1979) , *cert. denied,* (1980) 444 U.S. 1049, even though compelled disclosure encroaches on basic First Amendment freedoms. *See Griset v. FPPC*, 8 Cal. 4th 851, 860-61 (1994), *Governor Gray Davis Comm. v. American Taxpayers Alliance,* 102 Cal. App. 4th 449, 464-65 (2002). These same compelling state interests that justify the PRA's incursions on fundamental First Amendment rights in the political arena, also necessarily limit the scope of the Agua Caliente's lesser common law interest in tribal sovereign immunity.

The seminal case addressing the constitutionality of campaign contribution disclosure requirements is *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the United States Supreme Court upheld a provision of the Federal Election Campaign Act, 2 U.S.C. § 434(e), that required any person making political contributions aggregating over $100 in a calendar year to file disclosure statements with the Federal Elections Commission, *id.* at 74-82. The Court acknowledged that "compelled disclosure, in itself, can seriously infringe on the privacy of association and belief guaranteed by the First Amendment" and may deter some potential donors from exercising their constitutionally guaranteed rights to contribute to political campaigns. *Id.* at 64, 68. As a result, it insisted that the government's asserted interests "survive exacting scrutiny" and required that there be a "substantial relation between the governmental interest and the information to be disclosed" in order for the disclosure requirement to pass constitutional muster. *Id.* at 64-65. Ultimately, the Court found that the governmental interests in providing voters with information to assist in the evaluation of their electoral choices and preventing corruption in the political process were

"substantial." *Id.* at 66-68. It further declared that "disclosure requirements . . . appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption . . . ." *Id.* at 66-68. Accordingly, the Court upheld the contributor disclosure requirement, even though it restricted First Amendment freedoms. *Id.* at 81-82.

The California courts have also repeatedly upheld campaign disclosure requirements against First Amendment or free speech challenge. Both the California Supreme Court and the Court of Appeal have recognized that the People's interests in informing the electorate and preventing corruption of the political process are "compelling." *See Griset*, 8 Cal. 4th at 861-62; *Socialist Workers 1974 Cal. Campaign Comm. v. Brown,* 53 Cal. App. 3d 879, 888-89 (1975) . Accordingly, irrespective of whether a reviewing court subjects the PRA to strict scrutiny or the lesser standard of review applicable to laws that impose less severe burdens on constitutional rights, *see Burdick v. Takushi,* 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983), these interests have been found sufficient to justify the narrowly drawn and minimally intrusive restrictions on the free speech and association rights of candidates, contributors, and lobbyists imposed by the PRA's reporting requirements. *See, e.g., Griset*, 8 Cal. 4th at 861; *FPPC v. Superior Court*, 25 Cal. 3d at 46-47; *Thirteen Comm.*, 168 Cal. App. 3d at 534.

One critical reason that campaign contribution and lobbyist reporting requirements have been upheld against First Amendment challenges is that the reporting requirements themselves "further[] First Amendment values by opening the basic processes of our . . . election system to public view." *Buckley*, 424 U.S. at 82; *see Griset*, 8 Cal. 4th at 862 (the PRA "seeks to further the First Amendment values of informed and open political debate and exercise of the electoral franchise"). Preserving of the integrity of the political process and informing "discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. Accordingly, as the precedents cited above amply demonstrate, these compelling state interests will justify narrowly tailored limits on even the most fundamental legal rights.

Unlike freedom of political speech and association, tribal sovereign immunity from civil suit in state court is by no means a fundamental legal right. It appears nowhere in the text or interstices of the federal or state constitutions. To the contrary, tribal sovereign immunity is a common law doctrine, developed "almost by accident," and perpetuated only with considerable skepticism by more recent case law. *See Kiowa*, 523 U.S. at 757-58. If the People's interests in informing the electorate and preventing corruption of the state political process are sufficiently compelling to justify the restrictions on the fundamental First Amendment rights of candidates, donors, and lobbyists that are imposed by the PRA's reporting requirements, they are certainly strong enough to limit the scope of the lesser common law doctrine of tribal sovereign immunity from actions to enforce those requirements. Indeed, it is hardly remarkable to conclude that when Indian tribes voluntarily inject themselves into the state's political processes and become the largest donors to state political campaigns and significant lobbyists of the state government, they move beyond the reach of tribal sovereign immunity. The compelling purposes of the PRA's reporting requirements mandate nothing less than the state's unfettered ability to enforce compliance by all major donors and lobbyists, including Indian tribes. As the PRA itself contemplates, any exception to these requirements impermissibly dilutes the state's ability to achieve the core First Amendment values served by major donor and lobbyist disclosures. *See* Cal. Gov't Code § 84400. If the electorate is to be fully and timely informed and corruption or its appearance is to be eliminated from the political process, all major donors and lobbyists must file the required reports and none may claim immunity from the consequences of failing to do so.

C. Agua Caliente's Massive Campaign Contributions And Extensive Lobbying Of State Government Officials Only Heighten The State's Already Compelling Interest In Asserting Jurisdiction To Enforce The Reporting Provisions Of The PRA.

If ever there was a case in which the state's compelling interest in judicial enforcement of campaign contributor and lobbyist disclosure requirements justified a limitation on the common law doctrine of tribal sovereign immunity, surely this is it. Agua Caliente has not merely involved itself in the state's political processes, it has spent millions of dollars to become one of the most significant campaign contributors and lobbyists in the state. As documented in the declaration of

Common Cause Executive Director James K. Knox, since 1997, Agua Caliente has contributed no less than $5 million to state political campaigns, Knox Decl. ¶¶ 19-20 & 22-23, and perhaps twice that much. Agua Caliente's contributions during this same period have consistently ranked it among the top ten donors to state legislative campaigns -- once as high as third. *Id.* ¶¶ 19, 22 & Ex. A. It has also spent nearly $400,000 on lobbying activities in the past two years alone. *Id.* ¶ 23. Collectively, Agua Caliente and California's other Indian tribes, to which Defendant's claims of tribal immunity from suit to enforce the PRA's reporting requirements apply equally, have made tens of millions of dollars in political contributions over the past five years (including a whopping $60 million to support the passage of Proposition 5 (the Indian gaming initiative)) and are now far and away the largest contributors to state legislative campaigns. *Id.* at ¶ 18-20.

If the tribal sovereign immunity doctrine were applied as Agua Caliente requests, California would thereby lose its ability to monitor effectively, and timely disclose to the electorate, the political activities of California's largest campaign contributors. The state's compelling interests in upholding First Amendment values by preserving the integrity of the political process and informing the electorate would thus be severely impaired. Agua Caliente's own track record is a case in point. Under the mistaken impression that the PRA's reporting requirements cannot be enforced against it in state court, Agua Caliente has repeatedly failed to report its political contributions and lobbying activities in a complete or timely manner and has at times entirely neglected its obligation to file required reports. *Id.* ¶¶ 27-29 & Ex. D. Without a judicial enforcement mechanism, the FPPC has no effective means of compelling Agua Caliente's compliance with its undisputable reporting obligations.

Three additional consequences of Agua Caliente's reporting failures further demonstrate why a finding that tribal sovereign immunity bars this enforcement action would severely undermine the state's compelling interests in enforcing the PRA's reporting requirements. The net effect of them would be to allow Agua Caliente and other Indian tribes to play by a different set of rules than all other lobbyists and contributors -- and, indeed, to create a regime of no rules for Indian tribes who choose to engage in such activities. First, although the recipients of Agua

Caliente's contributions also must report them to the Secretary of State, if Agua Caliente cannot be compelled to file complete and timely reports, the general public and the media will face considerable difficulties when attempting to learn how much influence this major campaign contributor and lobbyist exerts over California's political process. Indeed, reporting deficiencies by Agua Caliente and other Indian tribes forced Common Cause to search recipient reports in order to complete a recent study of political contributions by the gambling industry. As a result, a process that was expected to take six months took two years to complete. In the mean time, California's voters were deprived of important information about some of the largest influences on the state's political system. *Id.* ¶¶ 15, 27.

Second, the PRA has a dual reporting requirement precisely to prevent the sort of corruption that might arise if recipients of political contributions knew that donors were not reporting them. Without the knowledge that their reports might be audited and compared with the reports of major donors like Agua Caliente and other Indian tribes, contribution recipients could evade disclosure of significant contributions from these sources, thereby increasing the likelihood that significant monetary influences on the state political process will go unreported and directly undermining a central purpose of the PRA. *Id.* at ¶ 14.

Finally, if the FPPC is unable to enforce the PRA's reporting requirements against them, Agua Caliente and other Indian tribes could serve as conduits for undisclosed contributions from other special interests wanting to conceal their influence over California's political process. *Id.* at ¶ 16. Here again, a fundamental purpose of the PRA -- disclosure of the financial influences on state politics -- would be severely impaired.

In sum, if one of the state's largest political contributors is left unanswerable for its widespread failures to disclose significant campaign contributions and the nature of its lobbying activities, the People's compelling interests in ridding California's political system of corruption and unseen influence and informing the electorate about the financial interests at work in state politics will be significantly compromised. Indeed, the extent to which Agua Caliente's involvement in the state political process implicates these interests makes this a compelling case in

which to hold that tribal sovereign immunity does not extend so far as to prevent the FPPC from bringing an enforcement action that is intended to preserve the integrity and fairness of the state's political processes.[2]

D. Asserting Jurisdiction Would Not Interfere with Agua Caliente's Sovereign Interests.

A finding that tribal sovereign immunity does not bar this case is also appropriate because Agua Caliente has no legitimate interest in avoiding this enforcement action, let alone a sovereign interest. This case does not implicate any of the tribal sovereign interests that have supported prior judicial findings that tribal sovereign immunity barred claims against tribes in other contexts. Tribal lands are not at issue. Nor are tribal self governance, commercial transactions involving the tribe or issues of tribal economic development and self-sufficiency. *See Kiowa*, 523 U.S. at 754-58. Importantly, the assertion of jurisdiction over this enforcement action would have no affect on Agua Caliente's ability to make campaign contributions, to engage in lobbying activities or otherwise to involve itself in the state's political process.

The only tribal interest implicated in this case is Agua Caliente's ability to make campaign contributions and engage in lobbying activities without reporting them, in violation of the PRA. That, of course, is not even a legitimate interest, let alone a sovereign one. *See Suitt*, 90 Cal. App.

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[2] Even if immunity did reach as broadly as Agua Caliente suggests, which it does not, Agua Caliente's voluntary entry into California politics and considerable efforts to exert influence through multi-million dollar campaign contributions and sustained lobbying activities would constitute a waiver of such immunity. Contrary to Agua Caliente's suggestion, Opening Brief at 8, a valid waiver of tribal sovereign immunity need not be in the form of an express statement waving immunity. A waiver of immunity by an Indian tribe, as opposed to abrogation of tribal immunity by Congress, may be effected by *conduct* that clearly evidences an intent to waive immunity. *See, e.g., C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (tribe waived immunity by entering a pre-dispute arbitration clause); *Witchita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986) (finding waiver of immunity by voluntary intervention as a defendant). Nor is it necessary for a tribe to "subjectively understand" that its conduct constitutes a waiver in order for such waiver to be effective. *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 8 (2002) (reversing finding of tribal immunity despite evidence that tribe did not "subjectively understand" that its conduct constituted a waiver). Here, Agua Caliente's unqualified participation in California's political process through massive campaign contributions and significant lobbying activities, with the undisputable knowledge that full, accurate and prompt disclosures are an express condition of its participation, constitutes precisely the type of clear waiver contemplated by the case law, irrespective of Agua Caliente's subjective understanding.

3d at 133 (the PRA's campaign expenditure reporting requirements do not implicate "any legitimate sovereign interest"). Agua Caliente simply cannot demonstrate how this action to enforce its obligations under the PRA to report truthfully about its multi-million dollar campaign contributions and extensive lobbying activities would have any adverse effect on tribal self-governance. *See Red Lake*, 303 N.W.2d at 56 (finding no evidence that compliance with state's campaign disclosure requirements would interfere with tribal self-governance). There is no tribal sovereign interest that justifies application of the doctrine of tribal sovereign immunity in this context.

E. Congress Has Not Abrogated California's Ability To Enforce The PRA's Reporting Requirements Against Agua Caliente By Its Silence.

In cases that implicate Congress' interests in regulating Indian affairs, the United States Supreme Court has extended the common law doctrine of tribal immunity to situations where Congress has failed to authorize suit expressly. *See Kiowa*, 523 U.S. at 757-58; *Potawatomi*, 498 U.S. at 510. This is not such a case. Agua Caliente's obligations to report its massive state campaign contributions and lobbying expenditures and activities implicate no cognizable federal interest. Accordingly, Congress's silence on the subject of whether tribes are immune from suits to enforce those obligations should not have the same effect it was given in *Kiowa* and *Potawatomi*.

Of course, the implicit assumption of any argument that congressional silence should be understood as reflecting an intent to extend tribal sovereign immunity to preclude this PRA reporting enforcement action -- *i.e.*, that Congress intends for one of a state's most active and significant political donors and lobbyists to be free to violate state laws aimed at ridding California's democratic institutions of undisclosed influence -- falls under its own weight. *Cf. Suitt*, 90 Cal. App. 3d at 132 (characterizing as "absurd" the argument that governmental entities should be free from the PRA's disclosure requirements because of the Act's silence about whether it applies to such entities).

Moreover, *Kiowa* and *Potawatomi* addressed whether tribal sovereign immunity would extend to claims seeking to impose tax or contract liability on Indian tribes as a result of their commercial activities either on or off the reservation. In that context, the Supreme Court interpreted Congress' silence as a determination to allow tribal immunity from suit to apply in order

to promote its "'overriding goal' of encouraging tribal self-sufficiency and economic development." *Kiowa*, 523 U.S. at 757-58; *Potawatomi*, 498 U.S. at 510. Enforcing the PRA's disclosure requirements against Agua Caliente, however, would not conflict with those goals. It would simply require Agua Caliente to disclose the massive sums it is spending to pursue them through the state's political processes.

Finally, it should be noted that *Kiowa* and *Potawatomi* were both cases arising from tribal commercial activities, which fall squarely within Congress' power "to regulate commerce . . . with the Indian tribes." U.S. Const. Art. I, § 8, cl. 3. The Court's inferences about the scope of tribal sovereign immunity in those cases were drawn from a context in which Congress has plenary authority. This case does not involve tribal commerce. The FPPC seeks to enforce statutory reporting requirements arising from Agua Caliente's involvement in state politics, an area that Congress has *not* been delegated the power to regulate. It therefore cannot be inferred from Congress' silence that Congress intended to extend tribal sovereign immunity to an area so far beyond its traditional interests in regulating the affairs of Indian tribes.

III. CONCLUSION

Over the past five years Agua Caliente has become one of the largest campaign contributors and most active lobbyists in California. Agua Caliente's decision to involve itself so extensively in state politics has both subjected it to major donor and lobbyist reporting requirements under the PRA and triggered the state's compelling interests in enforcing those requirements -- *i.e.*, preventing corruption in the political process and keeping voters informed. The magnitude of those state interests and the extent to which Agua Caliente's involvement in state politics implicates them compel the conclusion that the common law doctrine of tribal sovereign immunity does not extend so far as to prevent the FPPC from pursuing this enforcement action against Agua Caliente.

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Accordingly, for each of the above state reasons, and for all of them, Agua Caliente's motion to quash should be DENIED.

DATED: December 10, 2002

Respectfully submitted,

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